IN THE SUPREME COURT OF MISSOURI

Supreme Court #_____

IN THE INTEREST OF B.T.

Dale Godfrey, Juvenile Officer of Jackson County

Respondent

vs.

T.E. (FATHER)

Appellant

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal involves the validity of a state statute and therefore the Missouri Supreme Court has exclusive appellate jurisdiction pursuant to Article V, Section 3, of the Missouri Constitution (amended 1982).

STATEMENT OF FACTS

Respondents supply this statement of facts to supplement the facts provided by the Appellants. B.T. (daughter) was born on April 6, 1990. (Tr. 29:3-5). On October 30, 1991, T.E. (father) voluntarily pled guilty to the crime of "Injury to a Child" for "intentionally and knowingly engag[ing] in conduct that caused bodily injury to [B.T.], a child 15 years of age or younger, by throwing her to the ground causing her head to strike the pavement." (Tr. 3-4; 29: 6-9). Thereafter, T.E. was sentenced to ten (10) years in the Institutional Division of the Texas Department of Criminal Justice. (Tr. 29: 12-19). T.E. was subsequently released from prison after serving his ten (10) year sentence in December 2002. (Tr. 29:30-30:1). Shortly after his release from custody, T.E. removed B.T. from the home of her grandmother and took her to Kansas City, Missouri. (Tr. 29:30-30:1).

On April 20, 2005, the Juvenile Officer of Jackson County, Missouri filed a first amended petition alleging that the child was without proper care, custody and support in that T.E. had physically abused the child by striking the child in the face with his fists, attempted to strangle the child, and hit the child repeatedly with a belt buckle. (L.F. pp. 13-16). The first amended petition further alleged that T.E. suffered from schizophrenia which prevented him from properly caring for the child, and that T.E. had sexually abused B.T. by having sexual intercourse with her from 2003 to the present. (L.F. pp. 13-16).

On May 24, 2005, the court held an adjudicatory hearing on the first amended petition and heard extensive evidence from the Juvenile Officer

including the testimony of B.T., the testimony of Jamie Craig-a Children's Division Investigator, the testimony of Elizabeth Filipowicz-also a Children's Division Investigator, the testimony of Iona Turner-the child's aunt, and the testimony of Kristin Gilgour-a forensic interviewer from the Child Protection Center. (L.F. pp. 29-31). The court also accepted into evidence municipal charges pertaining to the father and the physical abuse he committed on B.T. by striking the child in the face. (L.F. pp. 29-31). T.E. also presented extensive evidence to the court including his own testimony, the testimony of Georgeline Nwareni, the testimony of Sheryl Reed and the testimony of Sandra Hamilton. (L.F. pp. 29-31). After hearing the extensive evidence from both parties in adjudication, the court found that the evidence adduced sustained the allegations filed by the Juvenile Officer. (L.F. pp. 29-31). The Court then continued the cause until June 28, 2005 for a hearing on further evidence on disposition. (L.F. pp. 29-31).

The Court specifically found in the adjudication that T.E. was unable to provide proper care, custody, and support to B.T. because he had physically abused B.T., repeatedly sexually abused B.T., and because he suffered from schizophrenia which rendered him unable to care for his daughter. At the dispositional hearing on June 28, 2005, the Court heard evidence from the Juvenile Officer regarding T.E.'s current mental, social, and economic status as well as his participation and progress in services provided by the Children's Division. (Tr. 2-35). The Juvenile Officer presented the testimony of the current Children's Division worker, Lori Mergner, the social file containing the current social work

report and criminal records for T.E. (Tr. 2-35). T.E. was also given the opportunity to present evidence at this hearing to prove his fitness. T.E. presented his own testimony. (Tr. 17-25). After hearing the evidence, the Court found that because T.E. had been convicted of "Injury to a Child", which would constitute a felony crime involving a child under Missouri law, pursuant to R.S.Mo § 210.117, T.E. was therefore precluded from having custody of B.T. (Tr. 21:20-22; 10, 31, 18-31, 19-24). The Court further ordered that the Children's Division provide services to the father including a psychological evaluation and substance abuse assessment. (L.F. pp. 37). Subsequently, Appellant filed the current appeal.

POINTS RELIED ON

I. THE ISSUE ON APPEAL IS MOOT AND THEREFORE THE PRESENT APPEAL IS IMPROPER.

a. Section 210.117 R.S.Mo. as cited by Appellant was not the law as it applied to T.E. on May 24, 2005 or June 28, 2005.

Principal Authorities:

Statutes:

R.S.Mo § 210.117

b. Section 210.117 R.S.Mo. has since been amended by the Legislature and no longer contains the enumerated crimes that T.E. committed and because § 210.117 R.S.Mo. as applied to T.E. is no longer in effect, the constitutionality of this statute is a moot issue.

Principal Authorities:

Statutes:

R.S.Mo § 210.117 (as amended on September 15, 2005)

II. IN THE ALTERNATIVE, THE TRIAL COURT DID NOT ERR IN FINDING THAT THE FATHER WAS STATUTORILY PRECLUDED FROM REGAINING CUSTODY OF HIS DAUGHTER PURSUANT TO R.S.MO § 210.117 BECAUSE THE STATUTE MEETS THE STRICT SCRUTINY TEST AND IS THEREFORE VALID AND CONSTITUTIONAL.

a. The state statute is valid and constitutional because it is narrowly tailored to further the universally recognized compelling state interest of protecting the welfare and safety of children.

Principal Authorities:

Cases:

Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054 (2000)

Whisman v. Rinehart, 119 F.3d 1303 (1997) U.S. App.

Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct 1879, 80 L.Ed.2d 421 (1984)

U.S. v. Salerno, 481 U.S. 739

Statutes:

R.S.Mo § 210.117

III. ALSO, IN THE ALTERNATIVE, THE TRIAL COURT DID NOT ERR IN FINDING THAT THE FATHER WAS STATUTORILY PRECLUDED FROM REGAINGING CUSTODY OF HIS DAUGHTER PURSUANT TO R.S.MO §210.117 BECAUSE THE STATUTE IS NOT OVERINCLUSIVE AND DOES NOT CREATE AN IRREBUTTABLE PRESUMPTION.

a. Section 210.117 R.S.Mo. is not overinclusive in that it applies to a carefully chosen and specified list of severe crimes that render one too dangerous and unfit to provide proper care to a child's life.

b. Section 210.117 R.S.Mo. does not create an irrebuttable presumption.

Principal Authorities:

Cases:

Vlandis v. Kline, 412 U.S. 441, 93 S.Ct 2230 (1973)

Statutes:

R.S.Mo § 210.117

R.S.Mo § 566

R.S.Mo § 568

i. Section 210.117 R.S.Mo. only applies after a child has been removed from a parent's care and custody, cannot be a ground for such removal, and only applies after the parties, including the individual convicted of one of the crimes

enumerated, has had the opportunity to present evidence in their defense.

Principal Authorities:

Cases:

In Re E.L.M., 126 S.W.3d 488, 495 (Mo.App.W.D. 2004)

In Re K.A.W., 133 S.W.3d 1, 12 (Mo. 2004)

Stanley v. Illinois, 405 U.S. 246, 92 S.Ct. 1208 (1972)

Statutes:

R.S.Mo § 210.117

R.S.Mo § 211.031

R.S.Mo § 210.125

R.S.Mo § 211.032.4

R.S.Mo § 211.032.5

R.S.Mo § 211.447

STANDARD OF REVIEW

The Supreme Court of Missouri determines issues of law such as the Constitutionality of Missouri statutes *de novo*. *Kirkwood Glass Co., Inc. v. Dir. Of Revenue,* 166 S.W.3d 583 (Mo. 2005).

ARGUMENT

I. THE ISSUE ON APPEAL IS MOOT AND THEREFORE THE PRESENT APPEAL IS IMPROPER.

a. Section 210.117 R.S.Mo. as cited by Appellant was not the law as it applied to T.E. on May 24, 2005 or June 28, 2005.

On August 28, 2004 the Missouri Legislature enacted § 210.117 R.S.Mo. (2004) which applied to parents whose children were lawfully removed from their custody. Section 210.117 R.S.Mo. (2004) as originally enacted stated:

> "No child taken into the custody of the state shall be reunited with a parent or placed in a home in which the parent or any person residing in the home has been found guilty of, or pled guilty to, a felony violation of chapter 566, RSMo, except for section 566.034 RSMo, when a child was the victim or a violation of section 568.020, 568.045, 568.060, 568.070, 568.080, 568.090, or 568.175, RSMo, except for subdivision (1) of subsection 1 of section 568.060, RSMo, when a child was the victim, or an offense committed in another state when a child is the victim, that would be a felony violation of chapter 566, RSMo, except for section 566.034, RSMo, or a violation of section 568.020, 568.045, 568.060, 568.065, 568.070, 568.080, 568.090, or 568.175 RSMo.".

On September 15, 2005, the Missouri Legislature amended, and the Governor signed, a new version of § 210.117 R.S.Mo. (2005) with an emergency clause making it immediately effective. Appellant cites the amended version of §

210.117 R.S.Mo. (2005) and not § 210.117 R.S.Mo. (2004) as it applied to T.E. In the present appeal, on May 24, 2005, Commissioner John F. Payne sustained a three (3) count, First Amended Petition alleging physical and sexual abuse and failure to provide appropriate care due to mental illness. On June 28, 2005, the Court held a dispositional hearing and issued Findings and Recommendations. In these Findings, the Court stated that "The Court finds and believes the father, [T.E.], has been convicted of a crime involving the child who is the subject of this proceeding, which such offense would be a felony under chapter 568, and is therefore precluded from having a child placed in his care pursuant to Section 210.117 RSMo." In 1991, T.E. pled guilty to "Injury to a Child" for throwing the child, B.T., to the ground causing her head to strike the pavement, in the state of Texas and served the maximum sentence in the Institutional Division of the Texas Department of Criminal Justice for such acts. The crime T.E. was convicted of would constitute a felony violation of either § 568.045, Endangering the Welfare of a Child in the 1st degree or §568.060, Abuse of a Child. Thus, §210.117 R.S.Mo. (2004) applied to T.E. Appellant does not properly cite § 210.117 R.S.Mo. (2004) as it was written and applied to T.E. in June 2005. Therefore, the present appeal is inappropriate.

b. Section 210.117 R.S.Mo. has since been amended by the Legislature and no longer contains the enumerated crimes that T.E. committed and because § 210.117 R.S.Mo. as applied to T.E. is no longer in effect, the constitutionality of this statute is a moot issue.

While the Court was correct in it's ruling of June 28, 2005, the legislature has since amended §210.117 R.S.Mo. (2004) and removed § 568.045 and § 568.060.1 R.S.Mo. On September 15, 2005, the legislature amended and the Governor signed a new version of §210.117 R.S.Mo. (2005) with an emergency clause making it immediately effective. The applicable portion of §210.117 R.S.Mo. (2005) currently reads:

> "1. A child taken into the custody of the state shall not be reunited with a parent or placed in a home in which the parent or any person residing in the home has been found guilty of, or pled guilty to, any of the following offenses when a child was the victim:
>
> (1) A felony violation of section 566.030, 566.032, 566.040, 566.060, 566.062, 566.064, 566.067, 566.068, 566.070, 566.083, 566.090, 566.100, 566.111, 566.151, 566.203, 566.206, 566.209, 566.212, or 566.215 RSMo;
>
> (2) A violation of section 568.020 RSMo;
>
> (3) A violation of subdivision (2) of subsection 1 of section 568.060, RSMo;
>
> (4) A violation of section 568.065, RSMo;
>
> (5) A violation of section 568.080, RSMo;
>
> (6) A violation of section 568.090, RSMo; or
>
> (7) A violation of section 568.175, RSMo.

> 2. For all other violations of offenses in chapters 566 or 568, RSMo, not specifically listed in subsection 1 of this section or for a violation of an offense committed in another state when a child is the victim that would be a violation of chapter 566 or 568 , RSMo, if committed in Missouri, the division may exercise its discretion regarding the placement of a child taken into the custody of the state in which a parent or any person residing in the home has been found guilty of, or pled guilty to, any such offense."

Therefore, §210.117.1 R.S.Mo. (2005) as amended and effective on September 15, 2005 and thereafter, did not apply to T.E. on June 28, 2005 and Appellant's citation of this statute is inappropriate. Further, because § 568.045 and § 568.060.1 have been removed, § 210.117 R.S.Mo. (2005) does not apply to T.E. Section 210.117.2 R.S.Mo. (2005) now gives the division and therefore the Juvenile Court discretion in considering violations of the enumerated offenses while determining placement of a child. As such, the issue in the present appeal, the unconstitutionality of § 210.117 R.S.Mo. (2004) as it applied to T.E., is moot as the statute no longer exists in the form in which it applied to T.E. and T.E.'s appropriate remedy in this matter would be through motion in the Juvenile Case.

II. IN THE ALTERNATIVE, THE TRIAL COURT DID NOT ERR IN FINDING THAT THE FATHER WAS STATUTORILY PRECLUDED FROM REGAINING CUSTODY OF HIS DAUGHTER PURSUANT TO R.S.MO §

210.117 BECAUSE THE STATUTE MEETS THE STRICT SCRUTINY TEST AND IS THEREFORE VALID AND CONSTITUTIONAL.

a. The state statute is valid and constitutional because it is narrowly tailored to further the universally recognized compelling state interest of protecting the welfare and safety of children.

Respondent agrees with Appellant that the right to raise one's children and direct their upbringing is a long established and recognized liberty interest protected by the 14th Amendment of the United States Constitution. Respondent further agrees that according to *Troxel v. Granville*, Due Process mandates that any government infringement upon a liberty interest must pass strict scrutiny. 530 U.S. 57, 80, 120 S. Ct. 2054 (2000). In order to pass strict scrutiny, the government action must be narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct 2258 (1997).

Section 210.117 R.S.Mo. (2004) meets the strict scrutiny test as required by law. This statute serves the important and compelling state interest of protecting the welfare and safety of minor children recognized not only by Missouri courts, but by most state and federal courts including the United States Supreme Court. According to *Whisman v. Rinehart*, "parents have a recognized liberty interest in the care, custody and management of their child. Both parents and children have a liberty interest in the care and companionship of each other. That liberty interest is limited by the compelling governmental interest in protection of minor children, particularly in circumstances where the protection is considered necessary as

against the parents themselves." 119 F.3d 1303, 10-11 (1997). *Whisman* clearly states that protection of minor children is a compelling government interest. This government interest is again emphasized in *Palmore v. Sidoti*, as the Court states "the State, of course, has a duty of the highest order to protect the interests of minor children…the goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." 466 U.S. 429; 104 S. Ct. 1879; 80 L.Ed.2d 421 (1984).

Section 210.117 R.S.Mo. (2004) is narrowly tailored to serve the compelling government interest of protecting the safety and welfare of children. In *U.S. v. Salerno*, similar to the case at hand, the Court dealt with an appeal from the application of a statute that limited a due process liberty interest. 481 U.S. 739, 107 S.Ct. 2095 (1987). While the liberty interest in *Salerno* differs from the liberty interest in the present case, the process of analyzing the statute's constitutionality is the same. The Court in *Salerno*, held that the appeal was a Due Process attack of a Bail Reform Act that allows the Court to detain an arrestee, thereby restricting his liberty interest in freedom before trial if the government can prove that no release conditions will reasonably assure the safety of any other person and the community. *Id.* The Court held that the statute was constitutional in that it carefully limited the circumstances under which detention could be sought to those involving the most serious of crimes. *Id.* The Court also found that the statute was narrowly focused on a particular acute problem in which government interests are overwhelming. *Id.*

Similar to *Salerno*, this case involves a Due Process attack of a state statute that limits a liberty interest, particularly the right to raise and direct the upbringing of one's children. This statute functions to address the particular acute problem of child abuse and neglect by serving the government interest of protecting the welfare and safety of children. It is narrowly tailored to that acute problem and government interest in that, similar to *Salerno*, this statute is carefully limited to the most serious of crimes. Section 210.117 R.S.Mo (2004) states that it applies when a parent has been found guilty or pled guilty to "a violation of an offense committed in another state when a child is the victim that would be a violation of chapter 566 or 568 RSMo, if committed in Missouri." 210.117.2 R.S.Mo. (2004). The crimes enumerated in chapters 566 and 568 involve serious acts of violence that render an individual who commits such crimes dangerous. Those particular crimes involve forcing a child to perform sexual acts as well as seriously physically abusing a child. Such acts pray on the innocence and vulnerability of children. Section 210.117.2 R.S.Mo. (2004) specifically emphasizes that the crime must involve a child to be included in the purview of this statute. The emphasis on this element of the crime as well as limiting the specific crimes enumerated, makes the statute narrowly tailored and focused on a particular acute problem, child abuse and neglect. Thus, §210.117 R.S.Mo. (2004) passes the strict scrutiny test in that it is narrowly tailored and serves the widely recognized compelling government interest of protecting the safety and welfare of children.

III. ALSO, IN THE ALTERNATIVE, THE TRIAL COURT DID NOT ERR IN FINDING THAT THE FATHER WAS STATUTORILY PRECLUDED FROM REGAINGING CUSTODY OF HIS DAUGHTER PURSUANT TO R.S.MO §210.117 BECAUSE THE STATUTE IS NOT OVERINCLUSIVE AND DOES NOT CREATE AN IRREBUTTABLE PRESUMPTION.

a. Section 210.117 R.S.Mo. is not overinclusive in that it applies to a carefully chosen and specified list of severe crimes that render one too dangerous and unfit to provide proper care to a child's life.

Section 210.117 R.S.Mo. (2004) is not overinclusive and in fact is very specific in including only the most serious crimes involving children. Section 210.117 R.S.Mo. (2004) states that it only applies when a parent has been found guilty or pled guilty to "a violation of an offense committed in another state when a child is the victim that would be a violation of chapter 566 or 568, if committed in Missouri." 210.117.2 R.S.Mo (2004). The crimes enumerated in chapters 566 and 568 are similar to one another in that they involve serious acts of violence that render an individual who commits such crimes dangerous. The statute further focuses the purview of its application to crimes involving children. The crimes enumerated are all crimes of the most serious nature that also involve children. This makes the statute constitutional.

b. Section 210.117 R.S.Mo. does not create an irrebuttable presumption.

While Respondent agrees with Appellant that statutes that create permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fourteenth Amendment, Respondent does not agree with Appellant's argument that § 210.117 R.S.Mo. (2004) creates an irrebuttable presumption.

i. Section 210.117 R.S.Mo. only applies after a child has been removed from a parent's care and custody, cannot be a ground for such removal, and only applies after the parties, including the individual convicted of one of the crimes enumerated, has had the opportunity to present evidence in their defense.

Appellant argues that §210.117 R.S.Mo. (2004) creates an irrebuttable presumption that certain parents are unfit, and because it creates that presumption it denies those people fair procedural due process by not affording them the opportunity to show that conditions making them unfit in the past no longer exist. This argument is wholly unfounded because a parent who falls within the parameters of § 210.117 R.S.Mo. (2004) is provided ample procedural opportunity to prove their parental fitness. Before § 210.117 R.S.Mo. (2004) applies, the child involved must be lawfully removed from the home of the parent as § 210.117 R.S.Mo. (2004) is specifically applicable to actions arising under § 211.031. In order to remove a child from a home, the state must have reasonable cause to

believe that a child is in imminent danger of suffering serious physical harm or a threat to their life as a result of abuse or neglect. §210.125 R.S.Mo. That harm can include many forms of physical abuse, sexual abuse, and neglect as long as that harm is serious enough to place the child in imminent danger. *Id.* The fact that a parent has been convicted of one of the crimes enumerated in § 210.117 R.S.Mo. (2004) does not warrant removal from the parent's home by itself. It is only after such removal and proof of abuse or neglect that § 210.117 R.S.Mo. (2004) applies. As such, the law requires that a hearing for adjudication of the Juvenile Officer's petition be held. §211.032.4 R.S.Mo. At that hearing, similar to all adjudicatory hearings, the parties are provided the opportunity to present evidence in support of their case. § 211.032.5 R.S.Mo. As such, after the Juvenile Officer presents evidence in support of its petition, the parents are also given the opportunity to present any relevant evidence in their defense. After the parties have been provided an opportunity to present evidence, the Court then decides whether the parent has failed to properly care for the child by either abusing or neglecting the child. § 211.032.4 R.S.Mo. If the Court sustains the Juvenile Officer's petition and finds abuse or neglect by the parents, the Court then holds a dispositional hearing. § 211.032.4 R.S.Mo. At that hearing, all of the parties are again given the opportunity to present evidence as to the current condition of the child and family. § 210.710 R.S.Mo. This is the point in which § 210.117 R.S.Mo (2004) applies and when evidence of a criminal conviction would be presented.

Therefore, it is only after the parents have had the opportunity in the adjudicatory hearing to present evidence in their defense as well as the opportunity in the dispositional hearing to present evidence of current conditions and parental fitness, that § 210.117 R.S.Mo. (2004) applies. As such, the parents are provided ample procedural and substantive due process to demonstrate their parental fitness.

As illustrated in the Statement of Facts, T.E. was given the opportunity on May 24, 2005 at the adjudicatory hearing to present evidence in his defense regarding whether he physically and sexually abused B.T. T.E. did present evidence in his defense. However, the Court did not find that evidence persuasive and sustained the Juvenile Officer's first amended petition. On June 28, 2005 at the dispositional hearing, T.E. was again given the opportunity to present evidence as to his current situation and parental fitness. T.E. presented evidence in the form of his testimony and testimony from the Children's Division worker on cross-examination. However, the Court again did not find T.E.'s evidence persuasive. It was only after the Court sustained the petition against T.E. that § 210.117 R.S.Mo (2004) applied. Therefore, Appellant's argument that T.E. was not provided the opportunity to rebut a presumption of unfitness is wholly unfounded.

Appellant argues that the case most analogous to the present appeal is *Stanley v. Illinois*, 92 S.Ct. 1208 (1972). Appellant argues that *Stanley* involves a statute that creates an irrebuttable presumption similar to the present appeal and that the law from *Stanley* shows that the Supreme Court views irrebuttable presumptions that infringe upon fundamental liberties as generally being

unconstitutional. *Id.* In *Stanley*, the Supreme Court held that the father "was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending a hearing to all other parents whose custody of their children is challenged, the state denied [father] the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* Contrary to *Stanley*, T.E. was provided a hearing on his fitness as a parent on May 24, 2005 and June 28, 2005. Thus, contrary to the father in *Stanley*, T.E. was provided equal protection of the laws as guaranteed by the Fourteenth Amendment and as emphasized by the case law Appellant cited as most analogous to the present appeal. The Court in *Stanley* also focused on whether the state had done anything to prove that the father was currently unfit to parent his children. *Id.* The Court in *Stanley* found the state had not done anything to prove the father unfit. *Id.* In the present appeal, and contrary to *Stanley*, the state presented extensive evidence of the father's acts of physical and sexual abuse against B.T. as well as evidence of the father's mental illness and lack of progress in services provided by the Children's Division. If this Court follows the precedent set in *Stanley v. Illinois*, the Trial Court in the present appeal satisfied the flaws the Supreme Court found in *Stanley* by providing T.E. with a hearing on his fitness and by looking at what the state had done to prove unfitness of T.E. to parent B.T. Therefore, while the statute in *Stanley v. Illinois* was found unconstitutional for the above-explained reasons, the statute in the present appeal obviously differs and

provides the appropriate equal protection as guaranteed by the Fourteenth Amendment.

Appellant argues that §211.447 is an example of Missouri Courts' distaste for irrebuttable presumptions. Appellant further cites *In Re E.L.M.,* which states that § 211.447 permits a prior judgment terminating a parent's rights in one case to serve as the basis to terminate the parent's rights in other cases as long as the same criteria are present that caused the prior termination. 126 S.W.3d 488, 495 (Mo. App. W.D. 2004). Appellant cites *In Re K.A.W.,* which states that the Court cannot terminate a parent's rights based on prior acts alone and that "there must be some explicit consideration of whether the past acts provide an indication of the likelihood of future harm." 133 S.W.3d at 9-10. Appellant argues that these cases indicate that under § 211.447, although a presumption initially exists, a parent is able to provide evidence to rebut that presumption of unfitness. Appellant further argues that § 210.117 R.S.Mo. (2004) and § 211.447 R.S.Mo. are similar to one another and that the same opportunity to rebut a presumption of unfitness that exists under § 211.447 R.S.Mo does not exist under § 210.117 R.S.Mo (2004).

Section 210.117 R.S.Mo (2004) is significantly different from § 211.447 R.S.Mo and therefore the case law pertaining to § 211.447 cannot be similarly applied to § 210.117 R.S.Mo (2004). Section 211.447 R.S.Mo. applies to cases involving termination of parental rights which are very different from abuse and neglect cases to which § 210.117 R.S.Mo. (2004) applies. Terminating a parent's rights is a permanent severing of all rights and contact between the parent and

child. Abuse and neglect cases present a much less permanent condition and provide for rectification of the circumstances that led the child into the care of the state. The Court in abuse and neglect cases has discretion in allowing contact with the parents and in providing services to the family to effectuate reunification. Due to the significant differences between the two, the same standard should not apply to both statutes. That being said, Appellant's argument still fails in that as stated above, a parent is provided ample opportunity to rebut any presumption assumed under § 210.117 R.S.Mo (2004) in the adjudicatory and dispositional hearings. T.E. was provided that opportunity and failed.

Further as referenced above in *In Re K.A.W.*, "there must be some explicit consideration of whether the past acts provide an indication of the likelihood of future harm." 133 S.W.3d at 10. In the present appeal, during the adjudicatory hearing there was significant consideration as to whether the past acts of T.E. provide an indication of the likelihood for future harm. There was significant evidence provided that despite his conviction in 1991, from 2003 until 2005 T.E. physically and sexually abused B.T. The crime committed in 1991 clearly indicated a likelihood of future harm in that T.E. did in fact subsequently repeatedly harm B.T.

Appellant further argues that § 210.117 R.S.Mo. effectively revokes the rights of any parent who has ever committed an act of abuse anywhere in the country, at any time, without allowing the parent the opportunity to prove that he or she is now fit or that circumstances that resulted in the prior conviction no

longer exist. Appellant's argument is clearly unsupported. As stated above, the acts of abuse encompassed in § 210.117 R.S.Mo. (2004) are specifically limited to the most serious crimes against children and this statute does not by any means revoke rights of parents who have committed just *any* act of abuse. Further, as demonstrated above, a parent is given ample opportunity to prove that he or she is fit to parent.

In the present appeal, T.E. was convicted of "Injury to a Child" when he threw the child, B.T., to the ground causing her head to strike the pavement. After T.E. served the maximum sentence for such crime, he removed B.T. from her grandmother's home and moved her to Kansas City, where shortly thereafter he began physically and sexually abusing her. While T.E. has at all times denied those allegations, the Trial Court after hearing extensive evidence from all of the parties, found by clear and convincing evidence that T.E. had in fact physically and sexually abused the child. Appellant contends that at the dispositional hearing the social worker testified that it was the goal of the Division of Family Services to reunify T.E. with B.T. and that this is further evidence of T.E.'s fitness and willingness to parent. As required by law, the Children's Division must make reasonable efforts to prevent removal of a child and promote reunification. § 211.183 R.S.Mo. It is not by the Children's Division's discretion or interpretation of the case that they recommended reunification. Thus, this fact alone has no bearing on the present appeal.

Appellant further argues that the Court did not make any findings regarding T.E.'s current fitness to parent B.T. The Trial Court found that T.E. had committed several horrible acts of abuse against B.T. and that some of those acts were very recent. By sustaining the first amended petition, the Trial Court found that at that time T.E. was unfit to parent B.T.

Section 210.117 R.S.Mo. meets and passes strict scrutiny in that it is narrowly tailored, by being limited to the most severe crimes involving children, to serve the recognized compelling government interest of protecting the safety and welfare of children. Further, because the statute is limited in the crimes in which it encompasses, it is not overinclusive. Finally, the statute does not create an irrebuttable presumption because it provides ample opportunity for a parent to prove their current fitness. While Respondent recognizes that § 210.117 R.S.Mo. infringes upon the liberty interest of parents to raise and direct the upbringing of their children, § 210.117 R.S.Mo. provides safety and protection to innocent, defenseless children who have already been victims of severe acts of abuse and/or severe acts of neglect. It is because children are innocent and defenseless, that the Court and Legislature have the duty to take every reasonable step to protect them. Section 210.117 R.S.Mo. is one such step.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Juvenile Officer by and through counsel, Jennifer E. Cicero, respectfully requests that the Court dismiss the current appeal as the issue of the constitutionality of § 210.117 R.S.Mo. as applied to T.E. is moot and therefore the present appeal is improper. In the alternative, the Juvenile Officer by and through counsel, Jennifer E. Cicero, respectfully requests that this Court find that Missouri Statute § 210.117 R.S.Mo. is constitutional and should therefore, not be overturned.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above was sent via U.S. Mail this 1st day of December, 2005, to:

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_____

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CERTIFICATE OF COMPLIANCE

I certify that the above and foregoing Brief of Respondent complies with the limitations contained in Rule 84.06 (b)(1) of the Missouri Rules of Civil

Procedure, in that the Brief of Respondent has 5821 words and the diskette has been scanned for viruses and is virus free.

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Attorney for Juvenile Officer